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FORM NLRB-5026
(5-78)

UNITED STATES GOVERNMENT
National Labor Relations Board

Memorandum

512-5081-1700
512-5081-3300
512-5081-7500

TO Gerard P. Fleischut, Regional Director
Region 26

DATE March 17, 1981

FROM Harold J. Datz, Associate General Counsel
Division of Advice

SUBJECT Alliance Rubber Company, et al.
Case 26-CA-8861; 8480; 8559; 8717

This memorandum confirms telephonic communication of March 5, 1981 in which the Region was authorized to dismiss the instant charge, absent withdrawal.

This Section 8(a)(1) case was submitted for advice on the issue of whether the complaint in Cases 26-CA-8480, 8559, and 8717, should be amended to allege the service of subpoenas duces tecum by the Employer on the 15 alleged discriminatees in advance of the hearing in those cases as an independent violation of Section 8(a)(1). 1/

An amended consolidated complaint in Cases 26-CA-8480, et. al. issued on December 30, 1980, alleging, inter alia, that the Employer interrogated employees regarding their Union activity through the use of polygraph examinations and subsequently terminated 16 employees for their Union activity. On January 17, 1981, 2/ nine days before the scheduled commencement of the hearing on this complaint, the Employer, through its attorneys, caused subpoenas duces tecum to be served on 15 alleged discriminatees named in the consolidated complaint. 3/ On January 22,

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1/ The issue of whether the Employer's law firm should be named as a respondent in the amended complaint was also submitted for advice. In view of the disposition herein, it is unnecessary to decide that issue.

2/ All dates hereinafter are in 1981 unless otherwise specified.

3/ The subpoenas directed the employees to produce at the hearing the following material:

1. All letters, correspondence, hand-outs, notes, memoranda, notes of meetings and/or
(Footnote Cont'd)

counsel for the Charging Party moved to quash the subpoenas. At the January 26 unfair labor practice hearing, after the attorneys for the Employer called for the production of the subpoenaed documents, the Administrative Law Judge (ALJ) heard argument on the motion to quash. On February 3, the Charging Party filed the instant charge, naming the Employer and its law firm, alleging that the named parties violated Section 8(a)(1) of the Act by causing the subpoenas to be served on the alleged discriminatees. On February 11 the ALJ granted the Charging Parties' motion to quash the subpoenas in question.

It was concluded, on the facts presented, that the service of the subpoenas duces tecum in the instant case was not violative of Section 8(a)(1).

First, it was noted that subpoenas duces tecum require individuals upon whom they are served to produce requested documents at a hearing at which they are to testify. Hence, the subpoenaed individuals' rights are protected by the full range of procedural safeguards afforded by a formal judicial proceeding. Thus, while a request by the Employer for the specific information subpoenaed in the instant case might, in another context, be deemed coercive interrogation, it could not be said that the service of the subpoenas duces tecum here was similarly unprivileged. This is particularly true where, as here, the ALJ ultimately granted the

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3/ (Cont'd)

> telephone conversations, and any other similar documents in your possession relating to membership and/or organizational activity on behalf of United Brotherhood of Carpenters and Joiners of America, or any subsidiary or affiliate thereof, at Alliance Rubber Company in Hot Springs, Arkansas, during the period from January 1, 1980, through May 8, 1980.
>
> 2. All reports, letters, correspondence, notes, memoranda, notes of meetings and/or telephone conversations, and any other similar documents relating to the original filing of the unfair labor practice charge against Alliance Rubber Company in Case No. 26-CA-8480, the subsequent amendment of this charge on or about July 22, 1980, and the investigation of the events alleged in and underlying these charges.

motion to quash the subpoenas.

Second, the material covered by the subpoenas duces tecum could be viewed as arguably relevant to the Employer's defense in the underlying case which alleges that the subpoenaed individuals were discharged for their Union activity. In addition, there is no evidence that the service of the subpoenas was done in bad faith. In these respects, the instant case was viewed as distinguishable from John Dory Boat Works 4/ where the Board found the service of subpoenas duces tecum to be violative of Section 8(a)(1) in circumstances where the subpoenas sought production of documents which were wholly irrelevant to the issues raised in the complaint, the employer's effort to subpoena the documents was undertaken in bad faith, and the service of the subpoenas had a "devastating" impact on the witnesses which adversely affected their ability to testify. 5/

In sum, it was concluded that in the circumstances of this case, the mere service of the subpoenas duces tecum, without more, provides an insufficient basis upon which to premise an independent violation of Section 8(a)(1). Accordingly, further proceedings on the instant charge were deemed unwarranted.

H. J. D.

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4/ 229 NLRB 844 (1977).

5/ There is no evidence of such adverse impact on the subpoenaed individuals in the instant case.

Yellow Limousine Service, Inc.	4-CA-11476, 11679	March 12, 1981
Cincinnati Rubber Manufacturing Co. Division of Thor Power Tool Co.	9-CA-16379	March 17, 1981
First Federal Savings & Loan Ass.	8-CA-14131	March 18, 1981
Youngblood v. Magnolia Nursing Home, Inc. Civil No. M-80-132-CA (E.D. Texas)	16-CA-9119; 16-CA-9185	March 18, 1981
Policy re Unemployment Compensation Benefits		March 24, 1981
Olsonite Corp. (Local 155, UAW)	7-CB-5019	March 30, 1981
Atlantic Mechanical Contractors, Inc.	1-CA-17,919	March 31, 1981
Avanto, Inc.	17-CA-9533	March 31, 1981

District 2, Marine Engineers Beneficial Association-AMO Grand Bassa Tankers, Inc.	29-CE-52	3/4/81
Sheeran v. America Commercial Lines, et al. Civil No. C-80-0251-L (a)	9-CA-14657 et al.	3/6/81
International Longshoremen's Association and its Locals Nos. 1422 and 1771	11-CE-7,8,9,10,11 11-CC-116, 117, 118, 119, 120, 121	3/6/81
Wheaton Industries	4-CA-11730	3/10/81
Alicia Guzman Burns Pace, Jack Leroy Pace, Alicia Guzman Burns d/b/a Stoney's Express, Stoney's Express, Inc., Marin Freight, Ltd.	7-CA-19720	3/10/81
Miller v. Theatre & Amusement Janitors Loca 9 Civil No. C-80-4582-WWS (N.D. Cal. 1981)	20-CP-772	3/11/81
SEIU, Local 250, AFL-CIO (Sierra Medical Enterprises, Inc., d/b/a Hilltop Manor Convalescent Hospital ("HMCH")	20-CB-5127; 20-CB-5129 and 20-CB-5129	3/11/81
Plough, Inc.	26-CA-8664	3/11/81
University of Dubugue	33-CA-5201	3/11/81
Thunderhill Investors,	19-CA-13037	3/11/81
Mueller Steam Specialties, Division of Core Industries	11-CA-9602, 9629	3/12/81
Cincinnati Rubber Manufacturing Co. Division of Thor Power Tool Co.	9-CA-16379	3/16/81
Local 299 Teamster (McLean Trucking Company)	7-CB-4840	3/17/81
Uniroyal, Inc.	8-CA-14483	3/17/81
Retail Clerks Union, Local 324 et al. (Sav-On Drugs, Inc.)	31-CB-3898; 3993; 3994; 3995; 3996; 3997; 3998	3/17/81
Standard Oil Company of Ohio (SOHIO)	8-CA-14195, 14258	3/17/81
Kusan Manufacturing - A Division of Kusan, Inc.	26-CA-8706	3/17/81
Alliance Rubber Company, et al.	26-CA-8861; 8480; 8559; 8717	3/17/81
Associated General Contractors of Minnesota (Independent Construction Truck Owner, Inc.) and Construction, Building Material, Ice and Coal Drivers and Helpers & Inside Empoyees, Local 22, a/w I.B.T.C.W. & H. of A.	18-CE-43 18-CE-44	

Associated General Contractors of Minnesota and Construction, Building Material, Ice & Coal Drivers and Helpers & Inside Employees, Local 221, a/w I.B.T.C.W. & H. of A.	18-CA-6724 18-CB-1036	
St. Joseph's Hospital	27-CA-4840	3/18/81
First Federal Savings and Loan Association	8-CA-14131	3/18/81
Local 282, IBT (Transit Mix Concrete Corp.)	29-CB-4197	3/18/81
Shreveport Federation of Musicians Local 116, America Federation of Musicians (Dean Mathis)	15-CC-1724; 15-CB-2236;	
Local 263, American Federation of Musicians (Rick Davis and Gerry V. Gaines d/b/a Sprintime)	31-CC-1244, 31-CC-1259; 31-CB-3507	3/18/81
Sun Ship Company	4-CA-11756; 11761; 11762; 11800	3/18/81
Teamsters Local 435 King Soopers, G.M. Warehouse	27-CB-1527	3/19/81
International Brotherhood of Electrical Workers, Lcoal 340 (Clyde G. Steagall, Inc., d/b/a Mid-Valley Electric)	20-CB-5190	3/19/81
General Motors Corporation. Chevrolet Moraine Engine Plant Chevrolet Division	9-CA-16824	3/19/81
Commander Die and Machine Company, and Donald Calbert, Individually	7-CA-18762	3/19/81
Wright-Bernet, Inc.	9-CA-15203	3/20/81
Betances Health Unit	2-CA-17628	3/20/81
Impex, A Dvision of Spencer Industries, Inc.	8-CA-14277	3/20/81
Juanita Hill, In Her Capacity as an Agent for Local No. 724, Amalgamated Clothing and Textile Workers Union, et al. (Rawlings Sporting Goods Company, a Division of AtO, Inc.)	17-CB-2365-1-2-3-4	3/23/81
Lombardi Bros. Meat Packers, Inc.	27-CA-6920	3/23/81
General Electric Company	39-CA-159	3/23/81
Yellow Limousine Service, Inc.	4-CA-11746, 11679	3/23/81
Pacific Maritime Association International Longshoremen's Union Local 19	19-CA-12915-; 19-CA-12915-5 19-CA-12915-7 thru 10; 19-CB-3929-12; 19-CB-3939	3/24/81

R. L. White Company, Inc.	9-CA-15677; 15814; 15933; 16199; 16276-1, -2; 16298-1; 16507	3/24/81
North America Soccer League	2-CA-26347 et al.	3/24/81
Laborers' Local 383 (Revco D.S., Inc.)	28-CC-709	3/24/81
Local 88, RWDSU (Level 1 Sportswear)	2-CB-8314	3/24/81
Commander Die and Machine Company, and Donald Calbert; Individually	7-CA-18762	3/24/81
Ohio Power Company	8-CA-13985	3/25/81
Advertiser's Manfuacturing Company	30-CA-6105; 6105-2; 6253; 6266	3/25/81
Philadelphia Electric Company	4-CA-11253	3/25/81
TRW-United Greenfield Division	10-CA-16299	3/26/81
International Alliance of Theatrical Stage Employees, Local 33	31-CE-163	3/26/81
C. F. & I. Steel Corporation	27-CA-7024	3/26/81
Maybelline Company	26-CA-8671	3/27/81
Alpine Produce Company	32-CA-2809	3/27/81
Dredging Contractors Association of California	32-CA-3137	3/27/81
Victor Martin d/b/a Swan Brass Beds	21-CA-19812, 19965	3/27/81
American Postal Workers Union (United States Postal Service)	4-CB-4098-P	3/27/81
St. Mary's Hospital	39-CA-152	3/27/81
Production Broaching and Machine Co.	7-CA-18505	3/27/81
Teamsters Local 164	7-CA-18089 (1-3)	3/27/81
Washington Beef Producers, Inc.	19-CA-12276 and 12296	3/27/81
Newspaper Guild of Wilkes-Barre, Local 120 (Wilkes-Barre Publishing Company)	4-CB-3803; 4-CB-3605	3/27/81
Banner Glass, Inc. t/a B.G. Supply	5-CA-12983	3/27/81
Terminal Maintenance, Inc. (TEMCO)	29-CA-7935	3/37/81
Chemetron Corporation, Railway Products Division	8-CA-14515	3/27/81
Northwest Engineering Co.	30-CA-6002	3/27/81

District 23, United Mine Workers of America (Valley Coal Sales)	9-CC-1094; Civil No. 80-022-0 (G)	3/27/81
Sheet Metal Workers' International Association Local 57	3-CC-1156	3/27/81
Marathone Cheese	30-CA-6308	3/27/81
General Electric	32-CA-2980	3/27/81
Alpha Beta Packing Company	27-CA-6967; 6967-2; 7068	3/27/81
Otto Baum & Sons Masonry, Inc., Southwest Masonry, Inc., and Sun Valley Masonry, Inc.	28-CA-5699	3/30/81
Gold Circle Department Stores	8-CA-13890; 8-CA-13890-2; 8-CA-13890-3	3/30/81
Cudahy Foods Company	28-CA-6051	3/30/81
L'Ermitage Hotel	31-CA-10775	3/30/81
International Brotherhood of Electrical Workers, Local No. 639 (Alan G. Gallatin, d/b/a Twin Oaks Electric)	31-CB-4082	3/30/81
Plumbers & Pipefitters Local No. 625 (Union Boiler Co.)	9-CB-4718	3/30/81
Community Health Plan of Suffolk, Inc.	29-CA-8478	3/30/81
United Food and Commercial Workers, Local 1439	19-CP-3986, 4007, 4008, 4045	3/30/81
Landfill, Inc.	27-CA-6982	3/30/81
Conbraco Industries, Inc.	11-CA-9564	3/31/81
Engineers & Scietists Guild (Lockheed-California Company)	31-CB-4092	3/31/81
Clark University	1-CA-18217	3/31/81
Local 117, IBEW (Mid-State Metal Building Systems, Inc.)	13-CB-9357; 13-CC-1184	3/31/81
Local 150, Operating Engineers (Mid-State Metal Building Systems, Inc.)	13-CD-287	
Monsanto Company Local 12, International Chemical Workers Union, et al. Monsanto Company	14-CA-14398 14-CB-5210	3/31/81
Laquna Village, Inc.,	21-CA-19128	3/31/81
R & R Enterprises	16-CA-9645	3/31/81
Princeton University	22-CA-9947	3/31/81
Aqua Gulf Distribution, Inc.	22-CA-10593, 22-CA-10561	3/31/81

Chrysler Corporation	33-CA-5068	3/31/81
Rapid Armored Truck Corporation	29-CA-8475	3/31/81
Cardinal Operating Company	8-CA-14413	3/31/81
Pemco Corporation	5-CA-12561	3/31/81
The Haircare Salon	19-CA-12933	3/31/81
United Food and Commercial Workers Union, Local No. 506 (Facciola Meat Co.)	32-CB-838	3/31/81
Associated General Contractors of Massachusetts, Inc.	1-CA-18120	3/31/81
Retail Clerks Local 36, United Food & Commercial Workers International Union, AFL-CIO-CLC (Wilderness Foods, Inc.)	7-CB-5023	3/31/81
American Postal Workers Union South Jersey Area Local (U. S. Postal Service)	4-CB-4023(P)	3/31/81
Penn Elastic Company	4-CA-11611, 4-CA-11643-1-2	3/31/81
Almac Cryogenics	32-CA-3344	3/31/81
International Alliance of Theatrical Stage Employees, Local 33 (Filmex)	33-CE-163	3/31/81
Superior Switchboard	8-CA-14408	3/31/81
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Frederick Calatrello, Regional Director March 13, 1989
Region 8 512-5009-0100
512-5012-8300
Harold J. Datz, Associate General Counsel 512-5012-8300-2500
Division of Advice 512-5012-8320-5000
512-5012-8380-6700
Makro, Inc. 512-5072-0100
Loehmann's Plaza/Renaissance Properties Co. 512-5072-3900
Case 8-CA-21058 512-5072-7700
512-5072-8500

This case was submitted for advice on whether the Employer and its landlord violated Section 8(a)(1) of the Act by (1) ordering the Union to cease picketing and handbilling on their premises; and (2) filing lawsuits in state court seeking to enjoin the Union from picketing and handbilling on their premises.

FACTS

Since May 4, 1988[1] Makro (Employer) has operated a retail store at the eastern end of Loehmann's Plaza, an L-shaped strip center consisting of about 18 stores. In order to shop at the Employer's store, customers may qualify for a membership card by presenting a drivers license and proof of employment, or provide the membership card of one of the Employer's competitors. [2] There is no annual fee.

[1] All dates are in 1988 unless noted otherwise.

[2] The Employer will accept as proof of employment a pay check stub, a work identification badge, or membership in a credit union. Even without proof of employment a person can still get a one-day passport.

There are several "outlots" bordering the shopping center containing a Burger King, a Friendly's, a Baker's Square restaurant, a Gold Circle, a Rini's Supermarket, a K-mart, and a garden store among others. The shopping center is bordered on the South by Chardon Road and on the east by Bishop Road, both busy two-lane highways with speed limits of 35 miles per hour. There are two entrances off Bishop Road approximately 4/10 of a mile from the Employer's facility. Neither of these entrances has a traffic light. There are three entrances off of Chardon Road ranging from 2/10 to 4/10 of a mile from the Employer's facility. The first and the third entrance have traffic lights. All of these entrances are heavily used by customers of the stores in the plaza, including those of the Employer. Bishop Road serves as an access road to and from Interstate 90, a major throughway, located approximately 2/10 to 3/10 of a mile from the plaza.

The Employer is located at the eastern end of the plaza. The front of the store is 400 feet wide with one entrance/exit door and two exit-only doors. There is a 7 foot covered walkway and a customer loading area contiguous to the 40 foot wide access road in front of the store. Across the access road is the parking lot, which has 7 parking islands at the end near the Employer's store, two of which are raised and five of which are painted on the drive.[3] This parking lot is visually separate from the parking lot generally used by the rest of the strip center.

The Employer has a no-solicitation sign posted on the doors of the entrance to Makro. The Employer has allowed other stores in the plaza to distribute flyers by its store entrances, which it claims it is required to do under its lease.[4] According to the Union, the Employer

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[3] While this parking lot is designated as primarily for the Employer's customers, the lease gives the Employer only a nonexclusive right to use the parking lot. Further, all of the parking areas in the plaza are considered common areas for all lessees.

[4] While the lease requires the Employer to allow other plaza stores to conduct tent and sidewalk sales in front of the Employer's store several times a year, it does not seem to address the distribution of promotional flyers by other stores near the Employer's store entrances. However, as the file does not include a complete copy of the Employer's lease, this issue is unclear.

permitted other solicitations outside the store. The Employer contends that it had no knowledge of some of the alleged solicitations, and when it discovered them it ordered the solicitors to leave its property.[5]

On April 28 the United Food and Commercial Workers, Local 880 (Union) notified the Employer by letter that it intended to establish a picket line on May 4 and to distribute handbills with the objective of informing the public that the store is nonunion and does not employ members of or have a contract with the Union. The letter further stated that the Union had no intention of causing work stoppages or interfering with deliveries or shipments. On May 4 the Union began picketing and handbilling at each of the Employer's doors. The signs read:

UFCW HOLDING THE LINE FOR THE
AMERICAN STANDARD OF LIVING
DON'T SHOP MAKRO
NON-UNION EMPLOYEES AND DELIVERY MEN NOT
SOLICITED

The Union's handbill contained a lengthier message elaborating the Union's position. The handbills explained that Makro, a new employer in the community, does not employ members of the Union and does not have a contract with the Union. In essence, the handbill argued that nonunion Makro was undercutting the local standards achieved through collective bargaining and asked consumers to help the Union "hold the line" for the "American standard of living." Some of the handbillers/pickets were Union-member volunteers from other facilities; the rest were unemployed workers hired by the Union for this purpose. None worked for the Employer.

Shortly after the picketing and handbilling started, agents of the Employer asked the Union to leave the premises. The Union refused. The Employer returned with the police and again asked the Union to leave; the Union refused to do so. The Employer's attorney claimed the Union was on private property and had no right to picket

[5] The plaza itself apparently does not have a no-solicitation policy and allows people to come onto the property to solicit for various causes.

there. The police informed the Union that as long as the pickets stayed orderly they could remain on the property. No further incident occurred until May 25 when Robert Stark, the owner of Loehmann's Plaza, and the Employer told the Union to leave their private property. Stark said the pickets should go to the entrances near the road. The Employer told the pickets to stand at the two entrances closest to Makro. This was understood by the Union to mean a Bishop Road entrance and the easternmost Chardon Road entrance. The Union again refused.

On June 6 the Employer and the Owner filed a petition in Lake County Court of Common Pleas, seeking an injunction limiting the picketing to two people at the two plaza entrances closest to the Employer.[6] These were not defined by the petition. On July 1 a preliminary injunction was granted, limiting the Union to four pickets no closer than 25 feet from the Employer's entrance doors.[7] The Union presently has four pickets/handbillers stationed in the parking lots on four of the islands. The Union also sometimes places two pickets at the two most westerly entrances off Chardon Road when it has extra pickets.[8]

Since the Union pickets/handbillers have been ordered to stand in the parking lot they have given out between 1500-2000 handbills each month. While standing near the Employer's doors they gave out around 40,000

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[6] The Employer contends that in a settlement discussion it offered to allow the Union to picket at two of the entrances. It is unclear whether the Employer's offer referred to the Bishop Road entrances to the plaza or inside the plaza at the end of the two Bishop Road entrances as well as a position on an access drive off Chardon Road. The Union contends that the Employer never suggested the use of the plaza end of the Bishop Road entrances. The Region has determined that the Union probably would be unable to handbill at any of these sites and that even if cars stopped to take a handbill, which the Region deemed unlikely, it would cause considerable congestion and create traffic problems. The Region also determined that if the Union's handbilling were limited to these sites (or to any two plaza entrances), the Union would probably miss the majority of the Employer's customers, who use all five of the entrances and apparently do not favor any particular one.

[7] This effectively places the pickets/handbillers in the parking lot because otherwise they would be standing in the middle of the busy access road in front of the Employer's store.

[8] The Region has determined that the picket signs at entrances cannot be read by cars turning into the plaza.

each month. The Union's pickets/handbillers also cannot reach any of the people who park outside of the Employer's parking area.[9] There is evidence that the Union pickets/handbillers in the parking lot must continually dodge parking cars.[10] In order to ensure their safety pickets/handbillers often station themselves on the raised islands in the parking lot. The Union also claims that handbilling and picketing in the parking lot is unsafe for the customers as well as for the pickets/handbillers.

The Union attempted to handbill at the two plaza entrances closest to the Employer, but gave up after one week because it had been unable to distribute even one handbill. The Union also attempted to picket at the most easterly entrance off of Chardon Road but stopped after there were complaints from Burger King and Rini's Supermarket, which occupy stores near that entrance. Rini's manager asked the Union to move because customers were questioning whether the Union had a dispute with Rini's. The Union did not attempt to station pickets at the Bishop Road entrances as these entrances are a long distance away and not in sight of the Employer's store.

On July 7 and 11 the Employer accused the Union of violating the court order since the Union had two pickets by one of the Chardon Road entrances as well as the four pickets in the parking lot. The Employer threatened to call the sheriff's department if the additional pickets were not removed. However, the sheriff's department did not appear. The Employer claimed that Loehmann's Plaza property runs to the very edge of Chardon Road. The Union argued that the two pickets by the plaza entrance were on public property since there was a 10 foot utility easement where the pickets stood. There are no public sidewalks surrounding the plaza.

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[9] Makro shoppers can and do park outside the Employer's parking lot area. Due to the high volume of traffic in the plaza, shoppers often park at the first convenient spot and then walk to Makro. When they have finished shopping at Makro they can drive to the customer loading area and load the items into their cars. These shoppers may never enter the Employer's parking lot area.

[10] Over a five day period the Union informally counted 292 incidents where a car drove over an area in the parking lot on which a picket/handbiller had just been standing.

On September 16 the preliminary injunction was made permanent. The Employer had argued once again that the Union should be limited to the two entrances to the plaza that are closest to Makro. However, the permanent injunction continues to limit the Union to four pickets/handbillers 25 feet from the Employer's store plus two additional pickets at an unspecified Chardon Road entrance.

ACTION

Complaint should issue, absent settlement, alleging that the Employer and the property owner violated Section 8(a)(1) by ordering the Union to cease picketing and handbilling on their property, and by maintaining a state court lawsuit to remove the Union from their premises.

In Jean Country[11] the Board held that an employer violated Section 8(a)(1) of the Act by, inter alia, refusing to permit a union's organizational picketing, which was privileged by the Section 8(b)(7)(C) publicity proviso, on private property in front of its store located in a large shopping mall. In so doing, the Board clarified its approach in access cases, and concluded "that the availability of reasonable alternative means is a factor that must be considered in every access case." [12] The Board stated that:

> in all access cases our essential concern will be the degree of impairment of the Section 7 right if access should be denied, as it balances against the degree of impairment of the private property right if access should be granted. We view the consideration of the availability of reasonably effective alternative means as especially significant in this balancing process. [13]

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[11] Jean Country, 291 NLRB No. 4 (Sept. 27, 1988).

[12] Id., slip op. at 3. The Board overruled Fairmont Hotel, to the extent that it held that "considerations of the alternative means factor must sometimes be excluded from our determination of whether and to what extent property rights should yield to the exercise of Section 7 rights." Id., slip op. at 3, n.2.

[13] Id. at 9.

In assessing the strength of property rights,[14] the Board will consider, among other things, the following factors:

> the use to which the property is put, the restrictions, if any, that are imposed on public access to the property, and the property's relative size and openness. [15]

Factors that may be "relevant in assessing the strength of Section 7 rights" include, among other things:

> the nature of the right, the identity of the employer to which the right is directly related (e.g., the employer with whom a union has a primary dispute), the relationship of the employer or other target to the property to which access is sought, the identity of the audience to which the communications concerning the Section 7 right are directed, and the manner in which the activity related to that right is carried out.[16]

And, factors that may be

> relevant to the assessment of alternative means include, but are not limited to, the desirability of avoiding the enmeshment of neutrals in labor disputes, the safety of attempting communications at alternative public sites, the burden and expense of nontrespassory communication alternatives and, most significantly, the extent to which exclusive use of

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[14] The Board noted that the party asserting the property right bears an initial burden of showing that it has an interest in the property and what that interest is. Id., slip op. at 7, n.7. Cf. Furr's Cafeterias, Inc., 292 NLRB No. 76, slip op. at 3 (January 31, 1989) (respondent failed to show property interest in sidewalk where union was handbilling); Polly Drummond Thriftway, Inc., 292 NLRB No. 44, slip op. at 5 (January 17, 1989) (same: respondent had only nonexclusive right to use sidewalk, which remained in control of shopping center's owner).

[15] Jean Country, slip op. at 8.

[16] Ibid.

the nontrespassory alternatives would dilute the effectiveness of the message. [17] (Footnote omitted).

The Board stressed, however, that the above categories (property rights, Section 7 rights and alternative means) are interdependent. Thus, "whether a particular situs is a vast expanse or cramped quarters may be relevant both to defining the strength of the property right and to deciding the reasonableness of conducting the Section 7 activity on its perimeter as an alternative means of communication. Similarly, the identification of an intended audience may be relevant both to the identification of the Section 7 activity (e.g., organizing employees or protesting an employer's unfair labor practices to the public) and to determining what means of communication constitute reasonable alternatives."[18]

In Jean Country, the Board found that the union was entitled to access to private property. First, it concluded that although Section 8(b)(7)(C) proviso picketing "is not on the stronger end of the 'spectrum' of Section 7 rights. . . it is a right that is certainly worthy of protection against substantial impairment."[19] The Board acknowledged that the union's activity had an organizational and recognitional objective[20] protected by the publicity proviso to Section 8(b)(7)(C). Because its immediate goal was to dissuade potential customers from patronizing the employer's store, however, it was of "lesser significance in the scheme of Section 7 than direct organizational solicitation or the protestation of

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[17] Id., slip op. at 8-9. We note that "the General Counsel bears the initial burden on the alternative means factor, i.e., that the General Counsel must show that without access to the property, those seeking to exercise the right in question have no reasonable means of communicating with the audience that exercise of that right entails." Id., slip op. at 7.

[18] Id., slip op at 9. See also Sahara Tahoe Corp. d/b/a Sahara Tahoe Hotel, 292 NLRB No. 86, slip op. at 14-15 (January 31, 1989) (examination of asserted alternative means of communication is not to be conducted in a vacuum; rather, it is contingent upon the location on the spectrum of the respective Section 7 and property rights).

[19] Jean Country, slip op. at 21.

[20] The union had thrice requested recognition of the employer, had solicited support from employees in the months prior to the picketing, and never disclaimed a desire to represent the employer's employees.

unfair labor practices. . . ." Nevertheless, it was undertaken for mutual aid and protection and was clearly protected by Section 7. [21] Further, the Board noted that the union's message, inasmuch as it was addressed to customers, was substantially diluted when picketing was restricted to public property, in view of the distance from the mall entrances to the store (1/4 mile); the large number of other stores in the mall (106); the large number of mall customers (10-20,000 per day); the improbability of communicating a meaningful message to "impulse shoppers;" and the possibility of enmeshing neutral employers in the labor dispute.[22]

Likewise, in W.S. Butterfield Theaters, Inc., 292 NLRB No. 8 (December 20, 1988), a two-member panel of the Board (Chairman Stephens concurred in the result) held that an employer violated Section 8(a)(1) by interfering with a union's picketing and handbilling on its property. There, the employer maintained a free-standing movie theater with an exclusive surrounding parking lot. Hence, it had a relatively strong property right. On the other hand, the union was engaged in a primary economic dispute with the employer and the union's activity was intended to publicize that dispute. As to alternative means, the Board found that picketing and handbilling near the entrance to the parking lot was not a reasonable alternative because it was ineffective and/or unsafe.[23] The Board reasoned that cars turning into the employer's parking lot from a four-lane street with a 35-m.p.h. speed limit, and the existence of bushes at the entrance, would make picketing and handbilling there unsafe. [24]

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[21] Id., slip op. at 20.

[22] Id., slip op. at 21-22.

[23] 292 NLRB No. 8, slip op. at 10-11.

[24] The lack of a traffic signal or stop sign contributed to the safety problem. There was no precise record evidence regarding the volume of traffic, but the Board was willing to presume it to be "more than minimal." Id., slip op. at 11 n. 11. Compare the following cases decided under Fairmont Hotel: L & L Shop Rite, Inc., 285 NLRB No. 122, slip op. at 3 (Board found no violation based on existence of alternative means of access at intersection of heavily-travelled, 35-m.p.h. streets, where General Counsel had not shown police intervention necessary to control traffic problems); Skaggs Companies, Inc., 285 NLRB No. 62, slip op. at 5 (6-lane, highly congested 35-m.p.h. street; no violation where no evidence that picketing and handbilling would create a safety hazard or exacerbate congestion); Browning's Foodland, Inc., 284 NLRB No. 104, slip op. at 5 (no violation where no evidence that

Moreover, the Board found that, due to vagaries of the situs, the union would not be able effectively to communicate its message to its intended audience from the parking lot entrance.

Finally, in D'Alessandro's, Inc., 292 NLRB No. 27 (December 29, 1988), the Board held that where an employer discriminatorily posts its property against nonemployee union solicitation, "a 'disparate treatment' analysis that focuses on the Respondent's discriminatory conduct, rather than [an] 'accommodation' analysis" is appropriate.[25] In that case, the employer had allowed sales, handbilling, and displays of boats and other vehicles in its parking lot. Since there was no evidence that the employer had a policy of barring access to its premises to outside individuals or organizations, but rather singled out union activity for exclusion, the Board found unlawful such content-based discrimination.

Applying these principles to the instant case, we conclude that the Employer and the property owner violated Section 8(a)(1) by denying the Union access to their private property.

A. The Existence of Property Rights.

A threshold question in all cases involving access to private property is whether the party that attempted to limit access had genuine interests in that property.[26] As noted above, the party asserting a property interest bears an initial burden of showing the existence and nature of such interest. The Employer has a leasehold interest only in its immediate premises and has only a nonexclusive right of common use with regard to the sidewalks and parking areas. Ultimate control over those areas rests with the landowner.[27] The shopping center

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picketing at entrance would pose a safety hazard or other traffic-related problems).

[25] 292 NLRB No. 27, slip op. at 9. See also Ordman's Park and Shop, 292 NLRB No. 92 (February 10, 1989).

[26] Jean Country, slip op. at 7 n. 7.

[27] For example, Section 6 (A)(a) & (B)(a)(1) of the lease between the Employer and the Owner of Loehmann's Plaza provide, in part:

> [T]he Common Area shall be all of the Shopping Center except for parts of the Shopping Center on which buildings are situated. When construction of

owner joined in the action to prohibit the Union activity on the sidewalk and parking lot in front of the Employer's entrances. Thus, a legitimate property interest was asserted.

B. The Accommodation Analysis.

The Employer violated Section 8(a)(1) of the Act by denying the Union access to its private property, inasmuch as the Union had no reasonably effective alternative means of communicating its message to the public. In this case, the Employer's property right is relatively weak. The Employer occupies one store among many in a shopping center. The plaza is open to the public for shopping or just browsing; indeed, as the Board noted of the mall in Jean Country, the plaza has "certain quasi-public characteristics . . . [that] enhance the mall's commercial nature and purpose . . . [and] tend to lessen the private nature of the property. . . ."[28] Further, there is no evidence that the Employer has maintained any rules that prohibit public access to areas outside the store.[29] Nor is there evidence that the parking areas or sidewalks are reserved for the exclusive use of the Employer and its customers. To the contrary, the Employer has permitted some plaza businesses to engage in the distribution of flyers by its doors. Finally, as in Jean Country, supra, there is no showing that the Union's picketing and handbilling obstructed customers or created a hazard to pedestrian traffic. In short, the private property right asserted by the Employer in reaction to the Union's picketing and handbilling is extremely weak.

> an additional building begins, the land shall be deleted from the Common Area. . . Landlord grants [Employer] a non-exclusive easement to use the Common Area and to permit [Employer's] customers, employees, invitees, agents, and contractors to use the Common Area. This easement may be in common with the other occupants of the Shopping Center and their respective customers, employees and invitees.

[28] Jean Country, slip op. at 17.

[29] Id., slip op. at 8. The Employer does prohibit public access to its store without a "Makro passport." However, this passport is not needed to enter its parking lot area or to walk on the covered walkway by the store's entrances. Thus, it does not affect the Employer's property rights in areas outside its store.

As to the landlord's property rights, these too are relatively weak. The landlord has opened the plaza to the general public.[30] As noted above, this openness contributed to the commercial viability of the mall. Also, the landlord has permitted outside groups to solicit in its property.

With respect to the Union's Section 7 rights, it is clear that its intended audience is the Employer's customers. Thus, although the Union's picketing with Section 8(b)(7)(C) proviso signs implies a recognitional and/or organizational object, [31] the Union's appeal was confined to consumers, rather than the Employer's employees, in an attempt to have the customers boycott the Employer and shop at unionized stores. Thus, the "Union's picketing was conducted at least in part on behalf of the unionized employees of those stores that were in competition with the nonunion [Employer]."[32] Further, the Union's picketing was conducted at the situs of the dispute, and in a peaceful and nonobstructive manner. The Employer's employees, however, were not themselves engaged in picketing and handbilling; nor were the pickets asserting their own Section 7 rights. In such circumstances, Jean Country, supra, teaches that the Union's picketing, although "not on the stronger end of the 'spectrum' of Section 7 rights. . . is a right that is certainly worthy of protection against substantial impairment."[33]

As to the Union's alternative means of communicating its message to the public, we recognize that the plaza here is smaller in size than the mall in Jean Country, supra. Although it no doubt attracts fewer customers, it is nonetheless heavily used, as evidenced by the fact that the Union distributed approximately 40,000 handbills a month. Moreover, the distance from the Employer's store entrances is as great as, if not greater, than that in Jean Country (2/10 to 4/10 mile as compared to 1/4 mile). Based on these factors and those set forth below, we would argue that, as in Jean Country, the Union is

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[30] See Emery Realty, Inc., 286 NLRB No. 32, slip op. at 4-5 (September 30, 1987).

[31] Jean Country, slip op. at 19-20, and cases cited therein.

[32] Id., slip op. at 20.

[33] Id., slip op. at 20-21.

unable to communicate its message from the entrances to the mall with reasonable effectiveness.

First, it is clear that the plaza entrances suggested as alternative areas by the Employer present safety problems. [34] The traffic conditions are at least as dangerous as they were in W.S. Butterfield, above.[35] Second, the Union's message in these cases is divided between picket signs that advertise the existence of a dispute and handbills that elucidate the Union's rationale for its boycott appeal. Where, as here, the handbill contains an important message that cannot be communicated by a picket sign, and the Union cannot effectively distribute the handbills from public property, the Employer substantially impairs the Section 7 exercise by confining the Union to the plaza entrances.[36] In addition, even if picket signs alone could effectively communicate the Union's message, the Region has found that signs at these locations could not be read by those entering the plaza.

Further, even if the signs were adequate and could be read, we concluded that the Union is unable effectively to communicate with its intended audience, the Employer's potential customers, from the plaza entrances offered by the Employer. As customers enter the plaza from five entrances that vary in distance from 2/10 to 4/10 of a mile from the Employer's store, the Union would not reach any customers that did not use the two entrances at which it was stationed. Thus, as all of the entrances are used about equally by the Employer's customers, the majority would not receive the Union's

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[34] With regard to the parking lot, we note that the Employer never offered locations within it to the Union. Therefore, in determining whether the Employer and the landlord violated the Act by removing the Union from the Employer's entrances, we do not consider the parking lot as an available alternative.

[35] In some cases the General Counsel may be able to meet the burden of showing unreasonableness due to safety considerations without documentation. Emery Realty, Inc., 286 NLRB No. 32, slip op. at 9, n. 13 (September 30, 1987).

[36] See W.S. Butterfield Theaters, 292 NLRB No. 8, slip op. at 7. We are not suggesting that a union is entitled to convey its message in the best possible way. We are saying only that where a handbill is part of the message, the Union is entitled to communicate this part of the message in a reasonably effective way. In the instant cases, handbilling at the plaza entrances was not reasonably effective.

message.[37] The Board also noted in Jean Country that there are a certain number of people who enter a shopping mall without knowing in advance where they will shop. When there is a "distance in time and space between the Union's communication of its message on public property to the general public entering the mall and the point when some of those who entered consider whether to patronize the [Employer], i.e., become potential customers, the meaningfulness of the Union's message would not only be diluted but the message itself would miss a conceivably substantial number of potential customers."[38] Thus, the Union could identify and communicate a meaningful message to an "impulse shopper" "only in a location with relative proximity to the store."[39] In this regard, we would argue that consumers visiting a shopping mall often enter food stores without advance plans to do so even if this type of "impulse shopping" may be more common among purchasers of such goods as jeans.[40] Similarly, the Union might not reach those shoppers who may have decided without prior planning to apply for a Makro passport while at the plaza for other reasons.

And finally, the Union's picketing at the plaza entrances here, as in Jean Country, has unintentionally enmeshed neutral stores in its labor dispute with the Employer. Plaza customers seeing pickets at the easternmost entrance on Chardon Road have questioned whether Rini's Supermarket, another food store, is involved in the labor dispute. Potential customers might have also assumed that the entire shopping center is involved in the labor dispute and turned away.

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[37] See W.S. Butterfield Theaters, supra, slip op. at 11.

[38] Jean Country, slip op. at 22.

[39] Id.

[40] We acknowledge that the requirement that all customers possess a "Makro passport" weakens the "impulse shopper argument even more in this case. However, we note that the passport is fairly easy to obtain. Further, the Region has determined that shoppers at the plaza do indeed shop at other stores and then make their way over to the Employer. In our view, however, the "impulse shopping" factor, while relevant, is not a particularly significant factor in assessing a union's need to be in front of the targeted store. Hence, even if that factor is relatively weak in the context of a targeted food store, this would not outweigh the other factors in these cases which establish the Union's need to be in front of the food store.

Based on all of the above considerations, we conclude that the Union is unable effectively to communicate its message to the public from the entrances to the shopping center. As discussed above, the Employer's property right here is weak and that right suffered little, if any, damage by the Union's presence; however, considering the absence of reasonable alternatives for the Union to conduct its picketing and handbilling, the Union's Section 7 rights would be substantially impaired without an entry onto private property.

We further conclude that, as a remedial issue, locations within the parking lot would not be reasonable alternative areas for the Union's activity. Although neither the Employer nor the landlord ever offered to allow the Union to picket and handbill in the parking lot, the state court ordered the Union to conduct its picketing and handbilling there. And, since July l, the Union has done so. Therefore, since a "reasonable alternative" need not be the most effective alternative, we have examined whether the Union reasonably can conduct its picketing and handbilling in the parking lot. We conclude that the parking lot is not a reasonable alternative for the Union for the following reasons: First, at most, the Union's full message appears to be reaching only 5 percent of the people reached when it was handbilling at the entrance and exit doors of the Employer's store. This is a significant reduction in effectiveness. Second, the Union cannot reach shoppers who do not come into the primary parking lot area. Thus, the Union cannot communicate its message to shoppers who park elsewhere for convenience or those who may decide, without prior planning, to shop at Makro or to apply for a Makro passport while they are in the plaza for other reasons. Third, there are safety concerns as to the parking lot that are not present near the doors. These safety concerns force the pickets/handbillers onto the raised islands in the parking lot, which lessens the effectiveness of the handbilling. Thus, for the reasons described above, the parking lot area would not be a reasonable alternative for the Union. Accordingly, we conclude that the Region should argue that the Union is entitled to engage in its picketing and handbilling in front of the Employer's store.

C. Disparate Treatment Analysis.

> We further conclude that there is not enough evidence to prove that the Employer has discriminated against Union solicitation. In D'Alessandro's, Inc., supra, slip op. at 9, the Board reemphasized the test set forth by the Supreme Court in NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 112 (1956):
>
> [A]n employer may validly post his property against nonemployee distribution of union literature if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message and if the employer's notice or order does not discriminate against the union by allowing other distribution. (Emphasis added.)

Thus, the Board held in that case that an employer violates the Act under a disparate treatment analysis if it does not have a policy of barring access to its premises but rather "singled out union activity for proscription from its premises."[41]

In the instant case, the Employer has a posted no-solicitation policy. While the Employer allowed other plaza businesses to distribute flyers in front of its store, it contends that it is required to do so by the terms of its lease. We concluded that this limited activity is insufficient to show that the Employer or landlords discriminated solely against Union activity. Moreover, the Employer appears to have enforced its policy against other solicitations. The evidence is insufficient therefore, to establish that the Employer "singled out union activity for proscription from its premises."[42]

D. State Court Lawsuit

Given our conclusion that the Union had a right to picket and handbill at the entrance to the Employer's store, it follows that the Employer and the property owner violated Section 8(a)(1) by seeking and obtaining a TRO and further injunctive relief requiring the pickets

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[41] 292 NLRB No. 27, slip op. at 10.

[42] Should the Region find evidence showing that the Employer or landlord permitted solicitations in front of the Employer's store by outside individuals or groups, it should resubmit the matter for advice.

to move to the parking lot and to the plaza entrances. This conclusion is not barred by Bill Johnson's Restaurants v. NLRB,[43] for the reasons set forth in Giant Food Stores, Inc., Cases 4-CA-16264, et al.[44]

Accordingly, complaint should issue, absent settlement, alleging that the Employer and the property owner violated Section 8(a)(1) by ordering the Union to cease picketing and handbilling on their property and by seeking to remove the Union from their premises by filing a state court lawsuit.

H.J.D.

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[43] 461 U.S. 731 (1983).

[44] Advice Memorandum dated March 23, 1987, pp. 5-6. See also American Pacific Concrete Pipe Co., Inc., 292 NLRB No. l33, slip op. at 4-5 (February 2l, l989).

FORM NLRB-5026 (4-80)

Release Datz

UNITED STATES GOVERNMENT
National Labor Relations Board

COPIES PLEASE

Memorandum

TO : Roger W. Goubeaux, Director
Region 31

DATE: July 16, 1981

FROM : Harold J. Datz, Associate General Counsel
Division of Advice

05068

512-5012-1701-5000
512-5012-3300
512-5012-3317

SUBJECT: Blue Shield of California
Case 31-CA-10964

This matter was submitted for advice on the issue of whether the Employer violated Section 8(a)(1) of the Act by promulgating a no-solicitation, no-distribution rule, exempting certain charitable activities.

It was concluded that the charge should be dismissed, absent withdrawal. Although the no-solicitation, no-distribution rule in the instant case 1/ exempts annual United Way and Blood Bank drives, it was concluded that such exemption does not render the rule invalid on its face. Thus, the Board has long held that an employer's limited allowances of worktime for charitable solicitations "falls short of establishing forbidden discrimination." 2/ The limited exception reserved in the Employer's rule was regarded as falling within this minimal level of solicitation which may be permitted without prompting a conclusion that the rule was discriminatorily intended to prohibit union solicitation. It was concluded that the fact that in this case, unlike in the above-cited cases, this exception was written into the rule does not warrant a contrary conclusion. Indeed, it could be argued that placing these minimal exceptions in writing could serve to make clear to the employees that only these exceptions are allowed, thus avoiding the creation of an impression of selective enforcement.

1/ The rule reads:

> Solicitation
>
> Solicitation of any type by employees during work time is prohibited.
>
> Distribution of literature of any type or description by employees during work time is prohibited.
>
> Distribution of literature of any type or description in working areas is prohibited.
>
> Violation of any of the above rules will result in immediate disciplinary action, including termination.
>
> Exceptions to this policy are the company-approved annual fund raising drives for United Way and Blood Bank Drives.
>
> Blue Shield of California

Employees who have distributed both "pro" and "anti" union literature in violation of this rule have been disciplined.

2/ On next page.

It was also noted that the Employer's practice of allowing annual United Way and Blood Bank drives is consistent with its health care financing functions and responsibilities, and therefore arguably privileged under Rochester General Hospital, 234 NLRB 253 (1978). Clearly, the ready availability of adequate blood supplies impacts on the timeliness and effectiveness of health care and therefore on the cost of such health care, which is of direct concern to the Employer. Similarly, the United Way distributes donations to numerous health organizations many of which conduct research as to the causes, cures, and prevention of disease. Thus, the Employer's support of such organizations through its encouragement of donations to the United Way relates indirectly to its business functions. Accordingly, under Rochester General Hospital, supra, also, the Employer's written exceptions to its no-distribution rule do not indicate a discriminatory purpose.

H.J.D.

2/ Serv-Air, Inc., 175 NLRB 801 (1969); Sequoyah Spinning Mills, 194 NLRB 1175 (1972); Montgomery Ward & Co., 227 NLRB 1170 (1977); Astronautics Corp. of America, 164 NLRB 623 (1967).

OPTIONAL FORM NO. 10
MAY 1962 EDITION
GSA FPMR (41 CFR) 101-11.6

05232

UNITED STATES GOVERNMENT

Memorandum

712-5042-6700
712-5042-6783-8000
712-5042-6783-9000

712-5084

RELEASE

TO : Roger W. Goubeaux, Director
Region 31

DATE: April 29, 1981

FROM : Harold J. Datz, Associate General Counsel
Division of Advice

SUBJECT: Southern Nevada Building Trades Council, et al.
(Catalytic, Inc., et al.)
Case Nos. 31-CB-3922; 31-CB-3927; 31-CC-1439-1440

These cases 1/ were submitted for advice on the issue of whether the charged parties ratified or adopted a wildcat strike and thereby violated Sections 8(b)(1)(A), 8(b)(3), and/or 8(b)(4)(B).

FACTS

Catalytic, Inc., is a maintenance subcontractor of Southern California Edison Co. (herein SCE) at the latter's Mohave Generating Plant in Nevada. Catalytic and the International Unions with which the Unions herein are affiliated, are parties to a collective bargaining agreement known as the General Presidents' Agreement. The Council is not party to this agreement. The agreement, in effect at all relevant times, contains a no-strike provision. In January 1980, Catalytic and the Council, on behalf of the Unions, began negotiating

1/ Case 31-CB-3922 was filed by Catalytic, Inc., and alleges that the 14 charged unions (herein the Unions) violated Section 8(b)(3) by striking to modify a collective bargaining agreement without giving appropriate Section 8(d) notice. The charged Unions are: Asbestos Workers Local No. 135, Boilermakers Local No. 93, Bricklayers Local No. 3, Carpenters Local No. 780, Electrical Workers Local No. 357 (IBEW), Ironworkers Local No. 433, Millwright Local No. 1827, Operating Engineers Local No. 12, Painters Local No. 159, Pipefitters Local No. 525, Plasterers Local No. 797, Sheet Metal Workers Local No. 88, Teamsters Local No. 631, and Laborers Local No. 872.

Case 31-CB-3927 was filed by Western Ash Company and Flyash Haulers, Inc., and alleges that the Unions and Council violated Section 8(b)(1)(A) by impeding ingress to and egress from that Charging Party's facility and by threatening employees with violence. Case 31-CC-1439 was filed by Combustion Engineering, Inc., and alleges that the Council violated Section 8(b)(4)(i) and (ii)(B) by inducing Combustion Engineering's employees to strike and coercing and restraining it, with the object of forcing it to cease doing business with the Mohave Generating

(Continued)

over the subject of subsistence pay. 2/ The parties reached impasse on or about September 11, 1980, at which time the Council's chief negotiator, Jeffries, told Catalytic that he could not guarantee that he could hold his men.

On September 16, Catalytic's millwrights walked off the job, but returned at the beginning of the day on September 17. A short time later on the same day, Catalytic's electricians, represented by IBEW Local No. 357, walked off the job and established picket lines at gates 2 and 3 of the SCE facility, the gates normally used by Catalytic employees. Also, on September 17, IBEW business agent Roy Smith telephoned a Catalytic representative and asked that "his" pickets be provided with sani-cans and ice water. The same day, Catalytic sent a telegram to the Council stating that it could not increase subsistence pay and that the employees had left the worksite after IBEW had established a picket line. The telegram did not allege that the strike was unlawful, although it is undisputed that no 8(d) notice was given before the walkout began. The Council made no reply to the telegram.

On September 18, the electricians were joined in the walkout by employees of the other crafts. The pickets (mostly, although not entirely, electricians) carried signs reading: CAT. UNFAIR/ SUB. TOO LOW.

On September 19, Smith again phoned Catalytic. Upon being told that the strike was illegal, Smith replied that IBEW was not involved, but that unless Catalytic "upped the ante" -- i.e., increased the subsistence pay -- the picket lines would stay up until hell froze over or until IBEW International President Charles Pillard took over the work himself. On September 23, Smith again phoned Catalytic and stated that unless Catalytic raised subsistence pay to $25 per day and 50 cents per mile, the picket lines would stay up.

1/ Continued:
Station. The charge in Case 31-CC-1439 was subsequently amended to allege that the Unions also took part in the aforesaid secondary conduct. Case 31-CC-1440 was filed by Western Ash Company and Flyash Haulers, Inc., and alleges that the Council and Unions violated Section 8(b)(4)(i)(B) by engaging in (i) conduct with an object of forcing said employers to cease doing business with Southern California Edison and to force Southern California Edison to cease doing business with Catalytic, Inc.

2/ The General Presidents' Agreement is silent on the subject of subsistence pay. Prior to January, 1980, Catalytic had been paying subsistence pay pursuant to an oral side agreement which also provided that the parties would reopen the subject of subsistence pay in January, 1980.

Prior to September 22, all of the picketing took place at gates 2 and 3 of the SCE facility. Most of the pickets were rank and file employees, mostly electricians. Also present at gate 2 on the morning of September 29 were stewards from IBEW, the Millwrights, the Teamsters, the Carpenters, the Sheet Metal Workers, the Iron Workers, and the Asbestos Workers. During the time that the stewards were present, a number of cars were prevented from entering gate 2 by the presence of pickets and parked cars blocking the gate. An IBEW steward, Silva, was present at gates 2 and 3 at various times during the strike. Silva at times acted as a leader of the pickets by denying supervisors access to the premises and, on one occasion, by having an unruly picket removed from the site.

On September 22, picketing spread to gates 5 and 6, which apparently were used predominantly by Combustion Engineering. There is no evidence that either of these gates was marked as being reserved for the exclusive use of any employer or employers. On September 23, picketing further spread to gates 1, 4, and 7. Gate 1 is, in practice, used by SCE employees. Gate 4 has a sign which reads, "Fly Ash Haulers, Inc., and its subcontractors Bins CTI Foothill Robertson from 7 a.m. to 4 p.m. use this gate. From 4 p.m. to 7 a.m. use SCE Main Gate." Gate 7 has a sign which reads, "This Entrance is for Fly Ash Haulers, Inc., Combustion Engineering, Peter Kewit [sic] and Sons and all other contractors other than Catalytic." 3/ Pickets at gates 1, 4, 5, 6, and 7 were identified as rank and file electricians. Boulders were placed across the road at various gates and access and egress were prevented at various gates. There is also evidence of threats, throwing of rocks, and discharging of firearms having occurred at various gates, although not necessarily while stewards or Union officials were present.

On September 23, Combustion Engineering sent a telegram to the Council stating that the Council and the Unions had no dispute with Combustion and that picketing should be confined to gates 2 and 3. On September 24, Western Ash and Flyash sent a telegram to the Council advising that Western Ash and Flyash were neutral and that picketing should be confined to gates 2 and 3. It appears that electricians picketed at gate 7 on September 25. There is no evidence of picketing having occurred at any gate other than gate 2 or gate 3 after September 25. Picketing ceased altogether on October 15.

ACTION

It was concluded that the Region should proceed consistent with the directions set forth infra.

It was noted initially that the only issue submitted for advice is that of agency; the Region has concluded that the above conduct, if

3/ The Region has concluded that gate 4 is not adequately reserved for the use of any employer.

engaged in by a labor organization, violated Sections 8(b)(1)(A), 8(b)(3), and 8(b)(4)(B). Thus, the liability vel non of the various charged parties depends on whether various aspects of the wildcat activity may be imputed to them.

Case 31-CB-3922

It was concluded that complaint should issue, absent settlement, alleging that the following Unions, by failing to disavow and take steps to prevent the conduct of their rank and file, of which they had knowledge, in striking for increased subsistence pay, ratified the strike and, by failing to give the requisite 8(d) notices, violated Section 8(b)(3): IBEW Local 357, Millwrights Local 1827, Teamsters Local 631, Carpenters Local 780, Sheet Metal Workers Local 88, Ironworkers Local 433, and Asbestos Workers Local 135. The charge should be dismissed, absent withdrawal, as to the other Unions and the Council.

In Plumbers Local 195 (McCormack-Young Corp.), 233 NLRB 1087 (1977), the Board set forth the following principles regarding union liability for rank and file conduct: 1) Where a union establishes a picket line, it is under a duty to control the picketing. If it is unwilling or unable to control its pickets, it must bear responsibility for their conduct. 2) A union will be held liable where it fails to disavow conduct which occurs in the presence of a union agent. 3) The General Counsel bears the burden of showing that the union authorized the picketing or had knowledge of the misconduct and failed to disavow it and take corrective action. See also Teamsters Local 860 (Delta Lines, Inc.), 229 NLRB 993 (1977); Roofers Local 30, 227 NLRB 1444 (1977).

Concerning the IBEW, it is clear that through its business agent, Smith, the IBEW knew that a strike was going on and recognized that its purpose was to gain an increase in subsistence pay. It was recognized that on September 19, Smith disavowed any IBEW involvement in the strike. However, immediately after the electricians had walked off the job on September 17, Smith asked that "his" pickets be provided with sani-cans and ice water. Moreover, during the course of the same conversation in which he purported to "disavow" the employees' conduct, Smith set the condition on which work would resume, and on September 23, Smith repeated the strikers' demand for $25 per day and 50 cents per mile as a condition to the removal of the pickets. In these circumstances, Smith's "disavowal" was considered to be self-serving, equivocal and ineffective. 4/ Of no

4/ Cf. McClintock Market, Inc., 244 NLRB No. 85 (1979) (disclaimer of recognitional objective rendered ineffective by subsequent inconsistent conduct).

less importance is the fact that Smith at no time took corrective steps to halt the strike. Being aware, through Smith, that its members were engaging in conduct which, if ratified by the Union, would be unlawful, given the lack of 8(d) notices, the IBEW was obligated to disavow and take steps to curtail such conduct. It did neither and, therefore, ratified the wildcat action. Accordingly, a Section 8(b)(3) complaint should issue as to IBEW.

There is also sufficient evidence to show that the Millwrights, Teamsters, Carpenters, Sheet Metal Workers, Ironworkers, and Asbestos Workers were on notice as to the unlawful nature of their rank and files' actions. Thus, while, unlike IBEW, none of these Unions was apparently in direct contact with Catalytic, each of them did have a steward present on the picket line on at least one occasion during the strike. It would be argued that the knowledge which these stewards possessed concerning the purpose of the strike would be imputable to their respective Unions, since the stewards' presence at the picket line was within the general scope of their authority to police the contract. See, e.g., Boilermakers (Regor Construction Co.), 249 NLRB 840 (1980); Teamsters Local 745 (Transcon Lines), 240 NLRB 537 (1979); Teamsters Local 886 (Lee Way Motor Freight, Inc.), 229 NLRB 832 (1977). Thus, since the above-named Unions were on notice as to the unlawful nature of the strike, and since they also failed to disavow or take steps to prevent further unlawful conduct, all of them would be said to have similarly ratified the wildcat action and thereby to have violated Section 8(b)(3). 5/

On the other hand, the evidence was considered insufficient to show that the remaining Unions were on notice as to the unlawful nature of the strike. Thus, the September 17 telegram from Catalytic to the Council merely stated that employees had left the jobsite after "IBEW had established a picket line." Since the Council was functioning as a bargaining agent for the Unions, notice to the Council as to the presence of a picket line may be imputed to the Unions. The Unions, however, cannot be presumed to be on notice of the purpose of the walkout, since the September 17 telegram was silent in this regard. Thus, the remaining Unions, i.e., other than the IBEW and Unions whose stewards were present at the picket line on September 29, cannot be presumed to have known that

5/ The mere presence of the stewards on the picket lines was not considered, nor would it be argued to be, sufficient to impute their conduct in striking to their respective Unions, since there is no evidence that the stewards (with the exception of IBEW steward Silva) were acting as leaders of the rank and file. Building and Construction Trades Council of Tampa (Tampa Sand Co.), 132 NLRB 1564, 1567-69.

the strike was called in violation of Section 8(d). Therefore, the remaining Unions were not considered under duty to disavow or take affirmative steps to end the walkout.

With regard to the Council, it was noted that it is not party to the collective bargaining agreement, and that, at least insofar as the instant dispute is concerned, the Council was merely acting as an agent of the Unions in negotiating subsistence pay on their behalf. In these circumstances, the Council was not viewed as liable for the Unions' conduct either independently or as their agent. Accordingly, the charge should be dismissed, absent withdrawal, as to the Council.

Case 31-CB-3927

It was concluded that complaint should issue, absent settlement, alleging that IBEW Local 357 violated Section 8(b)(1)(A) by engaging in various acts of misconduct in the presence of steward Silva. It appears that Silva was acting not as a rank and file picket, but rather as a leader or person in charge of the employee activities at gates 2 and 3. Compare Tampa Sand Co., supra. Thus, when supervisor Mathis attempted to enter the site on September 23, he was told by a rank and file employee that he could not enter without talking to Silva first. On September 22, a security guard complained to Silva that a picket was brandishing a handgun. Silva stated that he would have the employee removed from the site, and the employee subsequently left. Since Silva, in his capacity as Union steward, acted and was treated as a person in authority at the picket site, it would be argued that he became an agent of the IBEW with regard to picket line activity. Accordingly, IBEW would be liable not only for all misconduct undertaken by Silva, but also for all misconduct which took place in Silva's presence and which IBEW failed to disavow or take steps to rectify. McCormack-Young Corp., supra. The Region should determine which alleged acts of misconduct took place in Silva's presence and should issue complaint against IBEW as to them as well as to those in which he was personally involved.

It was further concluded that the Section 8(b)(1)(A) charge should be dismissed, absent withdrawal, with respect to the remaining Unions and the Council, since there is no evidence that these parties were on notice as to any allegedly unlawful conduct. McCormack-Young Corp., supra. 6/

Cases 31-CC-1439 and 31-CC-1440

It was concluded that these charges, alleging Section 8(b)(4)(B) violations by the Unions and the Council, should be dismissed, absent withdrawal, because there is no evidence that any secondary activity of more than an isolated or de minimis nature took place after the Council was notified that neutrals were becoming enmeshed in the primary dispute. It is recognized that in the Region's view, some of the wildcat activity was secondary if undertaken by a labor organization. 7/ However, it does not appear that any secondary picketing occurred after September 25. Where a labor organization has been notified of unlawful rank and file activity for which it is putatively responsible, it will not be held liable under the Act if the activity ceases before the labor organization has had a chance to prevent it from recurring. Cf. Delta Lines, supra, at 994. 8/ In the instant cases, the Council was notified of "secondary" picketing by telegrams from Combustion Engineering and Western Ash on September 23 and 24, respectively. With the exception of one instance on September 25, it does not appear that picketing at allegedly neutral gates occurred after the Council received notice of the picketing. Accordingly, it does not appear that the General Counsel can make an affirmative showing 9/ that the Council, upon being notified of the "secondary" picketing, failed to take the necessary steps to prevent further occurrences. The charges in Cases 31-CC-1439 and 1440 should accordingly be dismissed, absent withdrawal.

H. J. D.

7/ It is doubtful that all of the alleged secondary activity, assuming that agency could be shown, violated Section 8(b)(4) as charged. Thus, it appears that the only gate to be adequately reserved was gate 7, since it alone bore a sign purporting to exclude employees of the primary (Catalytic).

8/ In Delta Lines, the unlawful conduct which occurred in the course of authorized picketing had been specifically forbidden in advance by the union. While the charged parties herein did not specifically forbid any conduct, such a requirement was considered inapposite where, as here, the charged parties had not authorized any rank and file conduct in the first place.

9/ McCormack-Young Corp., supra, at 1088.

FORM NLRB-5026
(5-78)

524-0167-1033
530-4825-6700

UNITED STATES GOVERNMENT
National Labor Relations Board

Memorandum

A.D. 05233 RELEASE

TO : W. Bruce Gillis, Jr., Director
Region 27

DATE March 23, 1981

FROM : Harold J. Datz, Associate General Counsel
Division of Advice

SUBJECT: Lombardi Bros. Meat Packers, Inc.
Case 27-CA-6920

COPIES PLEASE

This case was submitted for advice on the issues of whether a Great Dane 1/ Section 8(a)(3) per se violation exists when a new Employer terminates only Union-represented employees while retaining unrepresented employees and, if so, whether the new Employer acquires a successorship obligation under Burns. 2/

FACTS

The meat cutters and truck drivers of Lombardi Brothers Meat Packers, Inc., (herein Employer) in which Sam Lombardi was the majority shareholder, have been represented by United Food and Commercial Workers, Local 634, AFL-CIO (herein Union) for many years. The last collective bargaining agreement expired on April 30, 1980, 3/ and the parties met numerous times after that to bargain for a new contract. On June 17 the Employer sent a letter to the Union stating that it was in the process of selling the business and that it was ready to bargain over the effects of such a sale on the current employees. On June 19 David Coffey signed an agreement to purchase the stock from Sam Lombardi. The purchase agreement required that all officers and directors of the company resign and relinquish all control over the operations of the company. Sam Lombardi was retained by Coffey as a consultant.

Coffey told Lombardi to terminate all fourteen production employees and truck drivers, i.e., all the employees in the unit represented by the Union, before Coffey assumed control of the business. Thus, on June 20 Lombardi, apparently acting as Coffey's agent, told the production employees and truck drivers that he was selling the business and that the

1/ N.L.R.B. v. Great Dane Trailers, Inc., 388 U.S. 26 (1967).
2/ N.L.R.B. v. Burns Security Services., 406 U.S. 272 (1972).
3/ All dates hereinafter are 1980 unless otherwise indicated.

new owner wanted a new crew, that therefore they all would be terminated on June 27 and that they could reapply with the new owner. Coffey did not require that the sales personnel, desk order employees, or office employees be terminated before he assumed operations; thus, they remained on. 4/ Coffey's business justification for the termination of all the unit employees while retaining the unrepresented employees was that he had more personal knowledge of the nonunion employees than of the Union-represented employees and/or cost inefficiency of the unit represented by the Union.

Coffey assumed operations immediately and the following aspects of the business remained the same: location, equipment, work, product, customers, and desk order, sales, and office personnel. Coffey rehired seven of the predecessor's production and maintenance employees and of that seven, three became supervisors. 5/ Three former unit employees applied and were not hired, and four or five former unit employees did not reapply. The production and maintenance unit presently consists of about fourteen or fifteen employees, as did the predecessor's unit. Only four of the current unit members had been in the Union-represented unit. Differences in the business are the following: a change in stock ownership, new officers and management, and a reorganization of the production process, including an increase in the number of supervisors.

On September 8 the Union sent a letter to Coffey requesting that he recognize and bargain with the Union, since he was a successor employer. Coffey responded to the Union's request on September 14, stating that he was not a successor employer and that, therefore, he had no obligation to bargain.

ACTION

It was concluded that complaint should issue, absent settlement, alleging that the new Employer violated Section 8(a)(3) of the Act by its conduct in terminating only the employees represented by the Union and requiring them to reapply, while retaining the unrepresented employees. Also, since the new Employer would have taken over the business with substantial continuity, including the predecessor's employees in sufficient number to constitute a majority of his unit employees, if he had treated the Union-represented employees like the unrepresented employees, the new Employer had a Burns obligation to recognize and bargain with the Union. Consequently, by refusing to recognize and bargain with the Union upon the Union's request, the Employer also violated Section 8(a)(5).

4/ Coffey had Lombardi terminate one of the office employees because of allegedly poor work habits and attitude. This person, unlike the Union-represented employees who were terminated, was not invited to reapply for work.

5/ Coffey personally invited back two of the predecessor employees among the group of seven that he rehired.

It is well established that if an employer's discriminatory conduct is "inherently destructive" of important employee rights, the Board may draw an inference of improper motive to find a violation of Section 8(a)(3) of the Act, even if the employer introduces evidence that the conduct was motivated by business considerations. 6/ The Board and courts have stated that "the most important interest of workers is in working." 7/ It would be argued that the new Employer's disparate conduct in terminating only the employees represented by the Union, while retaining the unrepresented employees was inherently destructive of important employee rights. Thus, even though the Employer is expected to introduce evidence of business justification, such evidence will be no defense to this theory of violation since the Employer's conduct herein in terminating all Union-represented employees constituted conduct which was so "inherently destructive," that it is a per se violation of Section 8(a)(3). 8/

The second issue before Advice is whether the new Employer is a successor and therefore has an obligation to recognize and bargain with the Union under Burns. The major factor in finding a successorship is continuity in the workforce, i.e., whether former employees of the predecessor constitute a majority of the new employer's unit employees, at a date by which the new employer has hired a "representative complement." 9/ Other relevant criteria are continuity of the same business operations, the same jobs and working conditions, the same machinery and method of production, the same product, and the same customers. 10/ In the instant case these criteria are substantially fulfilled, but for the unit majority requirement.

However, numerous cases have held that a new employer who declines to hire the predecessor's employees because they are members of a union commits a violation of Section 8(a)(3), and a successorship status will arise by operation of law. 11/ In those cases there was evidence of anti-union animus and schemes to avoid the union. In the instant case,

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6/ Great Dane, supra.

7/ Borg Warner Corp., 245 NLRB No. 73, ALJD at 14 (1979) and Allied Mills, Inc., 218 NLRB 281, 289 (1975) citing Cooper Thermometer Co. v. N.L.R.B., 376 F.2d 684, 688 (C.A. 2nd 1967).

8/ Sam Lombardi, the predecessor Employer and not David Coffey, the new Employer, told the Union-represented employees that they would be terminated, but it would be argued that since Lombardi was acting on Coffey's instructions in terminating the Union-represented employees, Coffey violated Section 8(a)(3). See Dews Construction Corp., 231 NLRB 182 fn. 4 (1977); Georgia-Pacific Corp., 221 NLRB 982, 986 (1975).

9/ Hudson River Aggregates, 246 NLRB No. 32 (1979), enf. 106 LRRM 2313 (C.A. 2nd 1981).

10/ Crawford Container, 234 NLRB 851 (1978).

11/ C.J.B. Industries, 250 NLRB 184 (1980); Crawford Container, supra; Houston Distribution Services, Inc., 227 NLRB 960 (1977).

the inference of anti-union animus derives from the Employer's "inherently destructive" conduct in terminating only the predecessor's employees that were represented by the union. Therefore, like the aforementioned cases, the successorship obligation will arise by operation of law based on the Employer's per se 8(a)(3) violation.

H. J. D.